BRIEF IN SUPPORT OF PETITION.

1. The opinion of the District Court is not officially reported, but appears at pages 12 to 17 of the record. The opinion of the Court of Appeals is reported in 119 Fed. (2d) 151, and appears on pages 26 to 34 of the record.

2. The jurisdiction of this Court is invoked upon the following grounds:

(a) The complaint avers the delivery of an item to the Chattanooga bank for collection and credit, the conditional crediting of the item to the account of the depositor, and the acknowledgment of receipt of such item accompanied by the stipulation that the item was taken at the depositor's risk until actual final payment, that the amount of the item might be charged back in the event no returns should be received within a reasonable time, even if the item itself could not be returned, and that the bank of deposit and other collecting agents should be agents of the depositor. The complaint further avers a collection of the item by the Cincinnati bank immediately before the closing hour of 2 P. M., on February 27, 1933, the crediting of the proceeds on that date to the account of the bank of deposit, the refusal of the collecting bank to honor a draft against the proceeds of collection on the immediately ensuing day of February 28, 1933, and shows that the fund was never available thereafter in due course of banking. Both the District Court and the Court of Appeals have held that, under those averments, the Chattanooga bank was the owner of the proceeds in the hands of the Cincinnati bank. Such decision conflicts with the following applicable decisions of the Tennessee Court, which should be controlling because the question is one of local law:

Bank of Louisville v. Bank of Knoxville (1874), 67 Tenn. 101;

Bank v. Cummings (1890), 89 Tenn. 609;
Givan v. Bank (Tenn. Chy. App. 1898), 52 S. W. 923, 47 L. R. A. 270;
Winchester Milling Company v. Bank of Winchester (1907), 120 Tenn. 225;
Bank & Trust Company v. Bonner (1911), 1 Higg. (Tenn. Court of Civil Appeals) 443;
Implement Company v. Mercantile Bank (1913), 128 Tenn. 320;
L. & N. R. R. Co. v. Federal Reserve Bank of Atlanta (1928), 157 Tenn. 497;
Dean Tobacco Warehouse Company v. American National Bank (1938), 173 Tenn. 365, 117 S. W. (2d) 747.

(b) The decision of the District Court and the Circuit Court of Appeals for the Sixth Circuit is in conflict with the decisions of two other Circuit Courts of Appeals rendered under similar facts.

Beane v. First National Bank & Trust Company of Asheville, N. C. (C. C. A. 4, 1937), 92 Fed. (2d) 382;
Washington Loan & Banking Company v. Fourth National Bank of Macon (C. C. A. 5, 1930), 38 Fed. (2d) 772.

(c) The decision of the District Court and the Circuit Court of Appeals for the Sixth Circuit is in conflict with applicable decisions of this Court.

Dakin v. Bayly, 290 U. S. 143;
Federal Reserve Bank v. Malloy, 264 U. S. 160;
Commercial Bank v. Armstrong, 148 U. S. 50.

3. It would seem desirable, in order to avoid unnecessary repetition, and in view of the fact that this brief is bound in the same cover with the petition for writ of certiorari, to refrain from again summarizing the averments of the

complaint. The summary will be found in the foregoing petition for writ of certiorari.

4. The petitioner will urge all of the questions presented by the assignment of errors contained in the foregoing petition for writ of certiorari, and specifies each and all of them as the errors that are to be urged.

ARGUMENT.

1.

AS BETWEEN THE PETITIONER AND SCOTT COUNTY THE FORMER IS THE OWNER OF RIGHTS PERTAINING TO THE DRAFT.

It was expressly held in **Scott County, Tennessee, v. Kent** (C. C. A. 6, 1938), 97 Fed. (2d) 971, that Scott County was not entitled to maintain an action for the proceeds of this same draft because the Oneida bank, petitioner in the instant case, had become the owner of Scott County's rights thereto. This decision was based upon certain holdings of law (which we think were contrary to the Tennessee law) and upon certain facts. These facts are indicated in the report of the opinion in the said cause at 97 Fed. (2d), page 973, where it is shown that Scott County, acting through its Trustee, had performed numerous acts by which it recognized that the petitioner was owner of the draft. It accepted two certificates of deposit in the amount of the draft, it made no proof of claim against the Chattanooga bank, nor did it demand that any part of the dividend paid by this bank be paid to the County. In fact, it did not communicate with the Chattanooga bank. A petition for writ of certiorari in that case was denied by this Court. **Scott County v. Kent**, 305 U. S. 658, 59 Sup. Ct. 358, 83 L. ed. 427.

The respondent has never denied that all rights which Scott County ever had are now vested in the petitioner. Thus Scott County has dropped from the situation, and the petitioner occupies the position of depositor in the Chattanooga bank.

2.

THE CHATTANOOGA BANK TOOK THE DRAFT AS AGENT AND DID NOT ACQUIRE TITLE THERETO.

(a) Tennessee Law Made the Chattanooga Bank Agent for the Petitioner.

Under the Tennessee law no distinction is made between deposits of checks and drafts for collection and deposits of them "as cash" so long as no withdrawal is made against a deposit of the latter type. In both classes of cases the making of a deposit gives rise to the relationship of principal and agent and the title remains in the depositor.

In **Milling Company v. Bank** (1907), 120 Tenn. 228, the holder deposited checks "to their credit as cash in the bank and checked out the proceeds." 120 Tenn., at page 229. It was held that the depositor was entitled to maintain an action for negligence directly against the second bank to whom the bank of deposit had forwarded the checks.[2] The Court applied to this, a transaction of deposit as cash, the rule applicable to deposits for collection, saying:

> "Under the rule designated by Mr. Morse as the Massachusetts rule, which prevails in Tennessee and several other States, each successive bank handling an item for collection is agent of the owner, and liable to him for the discharge of the duties incumbent upon collecting agents, and the several banks in the course of the chain of transmission are held responsible only for the selection of proper agents, and for their own dili-

2 The Tennessee Court more recently has held that if the depositor withdraws part or all of the amount of the item the bank of deposit becomes owner pro tanto. **Groveland Banking Company v. City National Bank**, 144 Tenn. 520; **Henderson Company v. Stout Company**, 6 Tenn. App. 692; **Flat Creek Savings Bank v. Federal Reserve Bank**, 15 Tenn. App. 527. These decisions, however, have no bearing here because the petitioner withdrew no part of the proceeds.

gence and propriety of action in respect of the collection. Bank of Louisville v. Bank of Knoxville, 8 Baxt. 101, 35 Am. Rep. 691; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Morse on Banks and Banking, section 214." 120 Tenn., p. 233.

In **Bank & Trust Company v. Bonner** (1911), 1 Higg. (Tenn. Court of Civil Appeals) 443, a case of deposit of a draft as cash, the Court held that the correspondent bank is the agent of the depositor.

In the case of **Barton Seed & Implement Company v. Mercantile National Bank** (1913), 128 Tenn. 320, a garnishment action was brought against the collecting bank for the purpose of appropriating the proceeds of the item in its hands to discharge a debt owed by the original depositor in the intermediate forwarding bank. The Court held that the proceeds of the item in the hands of the collecting bank were the property of the depositor and not of the forwarding bank.

In the case of **L. & N. R. R. Co. v. Federal Reserve Bank** (1928), 157 Tenn. 497, it was held, with respect to a deposit of checks "as cash," that a bank to which the bank of deposit forwards the items for collection "becomes the agent of the customer, and, if the debt be lost by the negligence of this agent so selected, the owner of the paper has a right of action directly against such agent." 157 Tenn., at page 507.

L. & N. R. R. Co. v. Federal Reserve Bank, supra, is in direct conflict with the case of **City of Douglass v. Federal Reserve Bank of Dallas**, 271 U. S. 489, 46 S. Ct. 554, 70 L. Ed. 1051, which is followed by the decision of the Court of Appeals in **Scott County, Tennessee, v. Kent**, 97 Fed. (2d) 971, at page 973. The Court of Appeals erred in thus following a so-called "Federal" rule and in failing to apply the doctrine of the case of **Erie Railroad Company v.**

Tompkins, 304 U. S. 64. This initial error has been carried on into the opinion in the instant case, which cites both **Scott County v. Kent**, supra, and **City of Douglass v. Federal Reserve Bank**, supra.

The most recent decision of the Tennessee Supreme Court is **Dean Tobacco Warehouse Company v. American National Bank** (1938), 173 Tenn. 366, 117 S. W. (2d) 746. In that case the plaintiff deposited a check in the East Tennessee National Bank of Knoxville drawn upon the American National Bank of Nashville. Immediate credit was given for the item. The deposit slip provided, however, "All items are credited subject to final payment in cash or **solvent credits**" (emphasis ours). 117 S. W. (2d), at p. 747. The check was forwarded to the drawee bank at Nashville, collected by it and the amount credited to the account of the East Tennessee National Bank. The American National Bank of Nashville was solvent, but the East Tennessee National Bank failed. It was held that the proceeds of the item had become the property of the East Tennessee National Bank upon collection and crediting to its account. The Court reasoned that, although the Tennessee Courts approve the Massachusetts rule which "makes the collecting bank the agent of the depositor," a rule of law "may be varied by contract, express or implied" (citing **Federal Reserve Bank v. Malloy**, 264 U. S. 160), and that the rule of law in Tennessee which ordinarily would have made the American National Bank the agent of the depositor had been expressly varied and modified by the agreement of the depositor and of the East Tennessee National Bank that upon a solvent credit being made to the account of the latter the relation of debtor and creditor should arise and the depositor should cease to be owner of the item or its proceeds. The Court expressly held, in clear conflict with the decision of the Court of Appeals in our instant case, that "in the cause on trial it

was the agreement of the parties that the East Tennessee National Bank should act as agent for complainant in collecting said check, and it was given authority to appoint a subagent for the purpose of collection." 117 S. W. (2d), at page 748. With respect to the designation of the bank of deposit as agent, the terms of the deposit slip in that case are similar to the terms of the deposit slip in our instant case. The similarity ceases only in respect to the provisions controlling the situation after collection of the proceeds by the collecting bank; in the Dean case collection and crediting to the account of the forwarding bank caused the forwarding bank, by the agreement, to become owner of the proceeds and debtor to the depositor, while in our instant case there was no provision with respect to "solvent credits," and a contrary intention is apparent from provisions (4) and (5) of the Chattanooga bank's letter of acknowledgment. By those provisions the Chattanooga bank clearly protected itself against loss by reason of the default or omission of a subagent bank, and particularly provided that, although the item itself could not be returned (e. g., in the event the item should be paid), the amount of the proceeds could still be charged back to the depositor if no returns should be received within a reasonable time. A reasonable time had not expired in the instant case because the banking situation became "frozen" on the day immediately following collection and crediting of the item.

The error of the Court of Appeals in its understanding of the Dean case is apparent from its statement that the deposit slip which was used in the Dean case "contained, in substance, the same conditions as found in the present letter of the Chattanooga National Bank of February 27, 1933" (R. 33).

Thus it is most humbly urged that the Circuit Court of

Appeals has not followed, but has disregarded, the doctrine of the case of **Erie Railroad Company v. Tompkins,** 304 U. S. 64.

(b) The Tennessee Rule Was Not Modified or Varied by the Agreement of the Parties, Which of Itself Would Have Made the Chattanooga Bank Agent.

The draft was forwarded "for collection and credit" (R. 2, par. 2), which would not give rise to the relation of debtor-creditor, but of agent-principal.

Washington Loan & Banking Co. v. Fourth National Bank, 38 Fed. (2d) 772, 774 (C. C. A. 5), which stood on a motion to dismiss the bill, is a case directly in point. Checks were sent by a bank to a correspondent endorsed generally, and "enclosed in a form letter as follows: 'Enclosed find for collection and credit items enumerated below. * * * Return promptly if unpaid.'" Some of the checks were forwarded by the receiving bank for collection to its correspondents. The Court held that the checks were sent for collection, and though credit was entered when the checks were received, yet the relationship of debtor and creditor between the two banks did not arise until reasonable time had expired for the fund to reach the agent bank after the collections of the checks had been made by subagents.

That the relationship of principal and agent was created by the delivery of the item for collection and credit is also the holding in the cases of **In re Jarmulousky** (C. C. A. 2, 1918), 249 Fed. 319, 322; **Bank of America v. Waydell,** 187 N. Y. 117, 118, 120; **Carson v. Federal Reserve Bank,** 235 N. Y. S. 194, 204.

The terms of the letter of acknowledgment sent by the Chattanooga bank expressly created the relationship of principal and agent.

The third section of that letter provides that items may be forwarded for collection or payment direct to the bank upon which drawn or payable "or to or through collecting agents." The fourth provides that "this bank or collecting agents" may receive cash or drafts of the payee bank or other bank and will not be liable for failure to collect drafts so received, nor for losses thereon, and that should the item itself be lost or no returns be received within a reasonable time, or the draft paying same be dishonored, the amount of the items may be charged back to the customer without liability on the part of the bank even though the item itself cannot be returned. These provisions go farther than the Florida statute, which, in **Federal Reserve Bank v. Malloy**, 264 U. S. 160, was held to convert a bank in which a check has been deposited for credit or collection into an agent of the depositor. They clearly show that the bank did not assume the responsibility of taking the check as its own.

Paragraph 5 provides that "each collecting agent is the agent of the depositor, and neither this bank nor any collecting agent shall be responsible for the defaults, neglects or omissions of any other bank or subagent, including the payee of such check or other items."

No more positive or unambiguous language could possibly be used than this to show that the Central Trust Company of Cincinnati, which collected the draft, did so as the agent of the depositor, to wit, the Oneida bank. And if the first clause could possibly be made more certain, that is accomplished by making each individual bank handling the check responsible solely to the depositor for its negligence. Now, in connection with these positive stipulations, observe the second paragraph, to wit: **"All items not drawn on this bank are taken at depositor's risk until actual final payment."** This can mean nothing else

than that the Central Trust Company, as the agent which made the collection for the Oneida bank, was responsible alone to the depositor, the Oneida bank, as long as the funds were in its hands or under its control; and its liability ceased and the liability of the Chattanooga bank began only when the fund was released from its control by transfer to another bank, and was received by or came under the actual control of the Chattanooga bank. We respectfully submit that the clear intent of these provisions cannot be rendered nugatory by any merely imaginary and strained construction that may be placed upon them, and that the condition expressed by the Chattanooga bank that the "delivery to the bank of items for collection or credit shall constitute acceptance of the above conditions by the depositor," together with the fact alleged in the complaint that the plaintiff was thoroughly familiar with these provisions and transmitted the draft to the Chattanooga bank with them in mind, knowing that it would be accepted for collection upon those conditions, constituted a contract which fixed the rights of the respective parties, and that it is just as binding under circumstances favorable to plaintiff as under circumstances favorable to the Chattanooga bank.

The communications thus passing between the depositor and the bank of deposit furthermore must be considered against the background set forth by the averments of the complaint, namely:

> "It in fact was the general custom, not only of the First National Bank of Chattanooga, but also of all banks in Chattanooga and those doing business with said banks to accept checks and drafts transmitted to them only as agents for collection; and as such agents to handle same for the real owners of the check or draft and not to become liable for the funds collected until actual final payment had been made to it,

and furthermore such was the rule of law which then, and for many years had, prevailed in the State of Tennessee." (R. 4, par. 4).

3.

PETITIONER'S OWNERSHIP OF THE DRAFT WAS TRANSFERRED TO THE PROCEEDS AFTER PAYMENT BY THE DRAWEE.

Under the conditions attached to the handling of the draft by the Chattanooga bank, as expressed in its letter of acknowledgment, that bank never bore the risk of loss of the proceeds of the draft. We submit that the fact that the petitioner was burdened with the risk of loss is a compelling indication that the petitioner was owner, and not a mere creditor of Chattanooga. We say that petitioner bore the risk of loss for the reasons shown in the following paragraphs:

First, the collection and crediting to Chattanooga's account by the Cincinnati bank did not amount to "actual final payment" to the Chattanooga bank. The ordinary import of the words "actual final" repudiates the idea that the mere entry of a credit, amounting at best only to a constructive payment, and the initial payment to Cincinnati, as contrasted with the requirement of a final or further payment to Chattanooga, would terminate the risk of loss resting upon the depositor. It has been so held, in substance, in **Federal Reserve Bank v. Malloy**, 264 U. S. 160, and **Dakin v. Bayly**, 290 U. S. 143. **Commercial National Bank v. Armstrong**, 148 U. S. 50, is also in point.

Second, on February 27, 1933, the Chattanooga National Bank drew a check for $40,027 upon the Central Trust Company of Cincinnati, payable to the Federal Reserve Bank, which would have required part payment out of the proceeds of the draft in question. On presentation of the

check on February 28, 1933, by the Federal Reserve Bank, the Central Trust Company refused payment because the Cincinnati Clearing House had restricted withdrawals of its members to 5 per cent of their balances (R. 7, par. 9). Under provision (4) of Chattanooga's letter of acknowledgment (R. 3), Chattanooga had the right to charge back, that is, the risk of loss continued to be borne by the petitioner after the Cincinnati bank dishonored the $40,027 draft. The phrase "whether the item itself can be returned or not" clearly contemplated the continuance of the risk of loss upon Oneida under the existing circumstances because the most likely reason for nonreturn of an item would be its payment by, and surrender to, the drawee—exactly what occurred here.

Third, provision (5) of the Chattanooga bank's letter of acknowledgment states that Chattanooga was acting as Oneida's agent and stipulated that Chattanooga would not be liable for the default or omission of the Cincinnati bank (R. 3-4). This provision clearly applies to the situation existing after Cincinnati collected the draft, as well as the situation before.

Fourth, there is no showing that Chattanooga was negligent so that it might be said to have assumed the risk of loss. In the absence of a showing of negligence the Chattanooga bank is not responsible to Oneida for the proceeds. **Spears v. Peoples' Bank** (1935), 168 Tenn. 397, 79 S. W. (2d) 289.

Under these circumstances the petitioner was the owner of the proceeds in Cincinnati's possession and the Chattanooga bank was merely acting under a "collection contract," as appears from the Tennessee law as stated in **Implement Company v. Bank**, 128 Tenn. 320, at pages 323-4:

"We are of the opinion that the agreement to charge

back in case the paper should be returned is a controlling consideration. It is irreconcilable with absolute ownership on the part of the bank. An agreement in advance to charge back on failure of collection imports necessarily only a limited ownership, as in case of a bailment. Under the most extreme view, the drawing of the draft in favor of the bank, under the facts stated, could amount only to an agreement for a conditional sale of the paper; that is, that the property should belong to the bank in case collection should be made, but in case it should not be made, then the paper should revert to the drawer. At least this would be but an indirect way of stating a collection contract, when considered in connection with the deposit of the face amount of the draft, and the right accorded by the bank to check on the deposit. The substance of the transaction would be a loan of credit by the bank for the face value of the paper, based on the paper as security therefor, to be paid out of the collection when made; if not made, the paper to be returned, and the indebtedness to stand in favor of the bank, to be made good otherwise by the customer."

In **Implement Company v. Bank**, supra, the Court held that the collected proceeds in the hands of the collecting bank were the property of the depositor and not of the forwarding bank, and subject to garnishment as the funds of the depositor.

We have already discussed the case of **Dean Tobacco Warehouse Company v. American National Bank**, supra, which sustains our contention that the terms of the communications between the depositor and the bank of deposit defined the relationship and governed the determination of ownership.

The holding of the Court of Appeals is therefore erroneous because it adjudged the Chattanooga bank to be the owner of the draft and of the proceeds thereof, although it bore no risk of loss.

The case of **Commercial Bank v. Armstrong**, 148 U. S. 50, was a suit of the plaintiff, Commercial Bank, to recover $17,460.32 from Armstrong, the Receiver of the Fidelity National Bank of Cincinnati, on the ground that the receiver was trustee of that sum for the plaintiff, who had forwarded items of that total to the Fidelity bank for collection. The proceeds of collections fell into two classes: First, collections of $7,209.59 had been made by subagents of the Fidelity Bank and had not been offset or remitted to the Fidelity Bank at the time of its failure, and, second, the balance of the sum collected by subagents had been credited by them to their accounts with the Fidelity and offset against obligations of the said Fidelity to said subagents. The Court held, with respect to the first class, that the plaintiff Commercial Bank was entitled as principal to receive such funds. That decision is in exact opposition to the decision of the Court of Appeals in the present case. In so holding the Supreme Court said:

> "Such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and listed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected" (148 U. S. 50, 57).

The case of **Washington Loan & Banking Company v. Fourth National Bank of Macon** (C. C. A. 5, March 7, 1930), 38 Fed. (2d) 772, is so exactly like the present case that the decision should be emphasized. The Macon bank had long been a depository of the Washington bank, just as the Chattanooga bank had long been a depository of the Oneida bank. Similarly, the Macon bank maintained an account in a Philadelphia bank, just as Chattanooga maintained an account in Cincinnati. The Court said that collections made and credits given by the Philadelphia

bank as early as November 21st, or five days before the failure of the Macon bank on November 26th, might be recovered by the Washington bank, depending upon what should be determined to be a reasonable time for the funds to become available to the Macon bank. Certainly, in the case at bar, where the draft was received on February 27, 1933, and the proceeds frozen in the Cincinnati bank at the opening of business on February 28, 1933, there can be no claim that these proceeds were ever available to the Chattanooga bank. This is demonstrated beyond argument by the fact that the Chattanooga bank's draft drawn on February 27th was dishonored by the Cincinnati bank on February 28th.

In the case of **Beane v. First National Bank & Trust Company of Asheville, N. C.** (C. C. A. 4, October 18, 1937), 92 Fed. (2d) 382, the plaintiff, a brokerage firm known as Fenner and Beane, deposited checks in the defendant, First National Bank & Trust Company, under an agreement that the depositor could not check on out-of-town deposits until such could be collected and the depositor notified of such collections. The plaintiff deposited two out-of-town checks, totaling $9,021.96, on February 28, 1933. These were sent to the Federal Reserve Bank at Charlotte, North Carolina, and by it to banks in Concord and Canton, North Carolina. The proceeds came back to the Federal Reserve Bank and were credited to the First National Bank & Trust Company's account on March 2, 1933, but the First National Bank was not advised until after banking hours on that day, at which time it was insolvent to the knowledge of its officers and never resumed its normal functions. The Court held that the proceeds of these two checks were the property of the plaintiff. It cited Commercial Bank v. Armstrong, 148 U. S. 50, with approval, saying: "It is clear from this decision that the mere collection of an item by a subagent bank does not necessarily constitute the comple-

tion of the collection between it and the owner of the item." The Court cites with approval Washington Loan & Banking Company v. Fourth National Bank of Macon, supra, saying that it was there held "under similar circumstances that the agency of a bank, entrusted with an item for collection and credit, ceases, and the relationship of general debtor to the depositor begins only when, the collection having been made by a subagent, the proceeds become available to the agent bank, and it in turn makes them available to the owner of the item, the mere collection of the funds and entry of them by the subagent to the credit of the agent being insufficient to terminate the latter's agency." The Court further said at page 386:

> "It is sufficient to point out that the entry of the credit on the books of the Federal Reserve Bank to the account of the Asheville bank did not actually afford the latter an opportunity to mingle or use the funds, because it had no knowledge that the collection had taken place until it was too late to exercise ownership over them. The cashier of the Asheville bank testified that the bank did not undertake to draw against a collection item until notified of its collection."

Certainly the Chattanooga bank had no greater opportunity than did the Asheville bank to mingle or use the funds, as it was similarly ignorant of their collection. And the unavailability of the funds is clinched by the dishonoring of Chattanooga's draft drawn on the same day the original draft was collected by Cincinnati.

4.

OPINIONS OF THE LOWER COURTS IN THIS MATTER.

The petition for rehearing filed on behalf of the petitioner in the Circuit Court of Appeals discusses in full the errors which we believe appear in the opinion of the Court

of Appeals (R. 37-45). It is there shown that the Court's conclusion, both that the Chattanooga bank became owner of the draft when it was received, and that, even if that did not occur, it became owner of the proceeds when the draft was paid to the Cincinnati bank, is in conflict with the Tennessee decisions which we have cited in this brief. The opinion appears to be an extension of the error committed in the opinion of the same Court in the case of **Scott County v. Kent**, 97 Fed. (2d) 971, wherein the Court did not apply the Tennessee law, but applied a federal rule theretofore existing. Indeed that opinion does not indicate any consideration of Tennessee cases. In the instant case the Court of Appeals was further in error in disregarding the allegations of the complaint regarding the custom prevailing during the times of the transactions and in misconstruing the case of **Dean Tobacco Warehouse Company v. American National Bank**, supra.

The District Judge apparently did not consider the Tennessee decisions. He held that "* * * the Chattanooga letter was but a statement of the matters the Chattanooga bank might rely upon as a defense in certain events" (R. 16). Even if the rule did not prevail in Tennessee that the deposit of a draft creates the relation of principal and agent, the quoted statement would be erroneous in view of the allegations of the original bill appearing on page 4 of the record. But the error is made more apparent by the rule of law in Tennessee. That rule cast the relation of principal and agent upon the Oneida bank and the Chattanooga bank; this relation was not created primarily for the benefit of either and was not one that could be "waived" by the Chattanooga bank in the event it would serve its interest to do so.

For the same reason the following statement in the opinion in **Scott County v. Kent**, supra, at page 973, appears erroneous:

> "There was no agreement that either the Oneida bank or the Chattanooga bank should receive the draft for collection only. In absence of agreement to the contrary the Oneida bank was vested with title to the paper."

In truth, it would have been necessary for the Oneida bank and the Chattanooga bank to agree affirmatively that the latter receive title to the paper in order to escape the effect of the Tennessee rule. The legal situation is exactly the contrary of that assumed by that opinion.

There is no problem of tracing the fund involved in this case. The allegations of the complaint show that the fund found its way, intact, into the hands of the respondent (R. 7-8).

For all of the foregoing reasons it is urged that the writ of certiorari be issued, and that the judgment of the Circuit Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

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